

MOUNT ROYAL JOINT VENTURE

IBLA 97-478

Decided July 31, 2000

Appeal from a decision of the Montana Acting State Director rejecting a proposed plan of operations. MTM 78411.

Affirmed.

1. Administrative Procedure: Generally--Administrative Procedure: Administrative Review--  
Appeals: Generally--Rules of Practice: Appeals: Generally

Where an operator requested State Director Review of a District Office letter responding to its demand for a decision on its plan of operations, and such letter offered several courses of action, including completing review of the original mining plan of operations, the State Director could have denied review as premature. However, where the State Director issues a decision which affirms that the plan of operations cannot be processed as it was submitted and allows the operator 30 days to decide to modify the plan or suggest other alternatives to the proposed plan of operations or the plan shall be deemed denied, the State Director's decision constitutes an appealable decision.

2. Administrative Procedure: Generally--Administrative Procedure: Administrative Review--  
Appeals: Generally--Rules of Practice: Appeals: Generally

Where, after receiving a letter from BLM advising that it will resume processing a proposed mining plan of operations, an appellant contends that BLM in the past had deliberately delayed taking action thereon, appellant's allegations will be rejected as moot.

3. Mining Claims: Determination of Validity--Mining Claims: Contests--Mining Claims: Plans of Operation

Approval or disapproval of a mining plan of operations is not a wholly discretionary action. While the mere pendency of a mining claim validity examination, without more, generally is not a proper basis for suspending consideration of a plan of operations, BLM properly may suspend consideration of a proposed plan during the pendency of a mining contest.

4. Mining Claims: Determination of Validity--Mining Claims: Plans of Operation

Where BLM has determined mining claims to be valid, it has the authority to establish reasonable conditions under which mining activities are to be conducted. BLM can preclude mining altogether by rejecting a plan of operations only upon a showing that the proposed mining activity constitutes unnecessary or undue degradation – that is, that the proposed activity will result in surface disturbance greater than that which would normally be expected when the activity is accomplished by a prudent operator conducting usual, customary, and proficient operations of similar character, with due regard for the effects of operations on other resources and land uses, including those outside the area of operations. 43 C.F.R. § 3809.0-5(k).

APPEARANCES: William L. MacBride, Jr., Esq., and James B. Lippert, Esq., Helena, Montana, for Mount Royal Joint Venture; Karan L. Dunnigan, Esq., and Gerald R. Moore, Esq., Office of the Field Solicitor, Billings, Montana, U.S. Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Mount Royal Joint Venture (Mount Royal) has appealed a May 2, 1997, Decision of the Montana Acting State Director, Bureau of Land Management (BLM). Mount Royal's predecessor, Manhattan Minerals (US) Ltd. (Manhattan), had filed a plan of operations (Plan) serialized as MTM 78411, dated February 20, 1992, styled as the Royal East Joint Venture Plan of Operations (Statement of Reasons (SOR) at 1-2), under which Royal East was the operator (Exh. I to SOR at 1). The Plan covers an exploration project located in the Sweet Grass Hills area in Liberty County, Montana. <sup>1/</sup> On June 3, 1992, Manhattan was informed that its Plan was complete. (Exh. F to SOR.) On July 7, 1992, BLM issued a decision withholding approval of

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<sup>1/</sup> The Plan covers land in secs. 19, 20, 29, and 30, in T. 36 N., R. 5 E., Montana Principal Meridian.

the Plan for the purpose of completing an Environmental Impact Statement (EIS). (SOR at 4-5.) BLM released a draft EIS in January 1993. (Exh. G to SOR.) By letter dated August 9, 1993, however, Manhattan was advised that an order segregating the Federal mineral estate in the Sweet Grass Hills from location for a 2-year period had been signed on July 29, 1993. Manhattan was further advised that BLM would be assessing long-term management options in the course of amending the West Hiline Resource Management Plan (RMP). BLM therefore suspended consideration of the Plan, finalization of the EIS, and consultation pursuant to section 106 of the Natural Historic Preservation Act, 16 U.S.C. § 470f (1994), and stated that it would begin examining unpatented mining claims in the project area to determine their validity. (Exh. H to SOR.) In July 1995, the Federal land in the Sweet Grass Hills area was again segregated and withdrawn from mineral entry for 2 years. <sup>2/</sup>

The validity examination was initiated in August 1993 and completed on November 22, 1995. The resulting mineral report concluded that 6 of the 14 claims included in the project were not supported by a discovery, and accordingly, in March 1996, BLM initiated a contest, BLM v. E.K. Lehmann & Associates, MTM 84834, which is pending before the Hearings Division of the Office of Hearings and Appeals.

By letter dated December 27, 1996, Mount Royal demanded that BLM issue a decision on the pending Plan. In support of that demand, appellant asserted that the Plan was complete; that provision for preventing unnecessary or undue degradation and for reclamation was complete; that the Plan had been subjected to a complete environmental analysis in which approval was identified as the preferred alternative; and that 4 years had elapsed without final action of the Plan, although the regulations required action within 90 days. (Exh. I to SOR at 2.) BLM responded to Mount Royal's demand on February 5, 1997. BLM denied that the environmental analysis was complete, noting that the EIS was a draft; denied that the National Historic Preservation Act review was complete; and noted that whether 6 of the 14 claims covered by the Plan constitute valid existing rights, because they are supported by a discovery, remained to be determined in the contest action. BLM's response further stated:

With completion of the mining claim validity examination and signing of the Record of Decision for the Sweet Grass Hills RMP Amendment on January 30, 1997, the BLM has completed the tasks necessary to continue processing the Plan of Operations. Therefore BLM is lifting the suspension of August 9, 1993, and will continue processing the Plan of Operations in cooperation with the Montana Department of Environmental Quality.

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<sup>2/</sup> Six other unpatented mining claims were located in the project area after the date of the segregation order, and these were declared null and void by BLM. That decision was appealed to this Board, which ultimately upheld BLM's decision. Mount Royal Joint Venture, 144 IBLA 27 (1998).

However, before we proceed further it is necessary that we get your input regarding what Plan of Operations to consider. As noted, BLM does not recognize any valid existing rights on six of the unpatented mining claims in the original Plan of Operations. Regardless of the outcome of the environmental analysis and [section] 106 review[,] BLM cannot approve a Plan of Operations on these lands.

(Exh. J to SOR at 1.)

Based upon the foregoing reasoning, the District Manager offered Mount Royal four options for proceeding with consideration of the Plan: (1) continue processing the Plan as submitted, which ultimately would be rejected to the extent that the six claims were included; (2) submit a modified Plan which excluded the six disputed claims; (3) postpone action until the possibility of a relinquishment of valid mining claims held by Ernest K. Lehmann <sup>3/</sup> through purchase, exchange, or conservation easement was examined, a possibility evidently raised in the RMP; <sup>4/</sup> or (4) postpone action on the Plan until after the mining claim contest was concluded. (Exh. J to SOR at 1-2.)

Appellant requested State Director Review, and by decision dated May 2, 1997, the Acting State Director upheld the District Manager's decision as follows:

Given the existing circumstances, the BLM cannot process the Plan of Operation in its present form. However, as stated in the District Manager's February 6, 1997, decision letter, the BLM is in the position to receive your modified Plan of Operation in cooperation with the Montana Department of Environmental Quality.

You are advised that until pending challenges to the segregation order, the withdrawal decision, and the mineral contest action are resolved, the BLM can only analyze proposals on those 8 mining claims with valid existing rights. Any other proposed exploration activity, excluding access, is not within the purview of BLM surface management regulations at 43 C.F.R. 3809 at this time.

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<sup>3/</sup> Ernest K. Lehmann & Associates (Lehmann) appears to be a principal in Mount Royal Joint Venture, although nothing in the record before us clearly establishes that relationship. We note, however, that counsel for appellant has represented the interests of both Mount Royal Joint Venture and Lehmann (Exh. I to SOR), and that BLM has acknowledged that the two are acting in concert (see, e.g., Exh. K to SOR).

<sup>4/</sup> Neither the RMP nor an excerpt of the RMP containing the discussion of the possibility of Lehmann's relinquishment of mining claims was provided by the parties.

Accordingly, it is the decision of this office that you notify the BLM Lewiston District Manager, within 30 days, of your intent to modify Plan of Operation MTM 78411 or your desire to discuss other reasonable options. If the District Manager is not notified within 30 days, the BLM will take no further action to process your Plan of Operation, and the proposal on file will be deemed denied.

Lastly, the decision included notice of a right to appeal to this Board. (Decision at 2.)

Thereafter, on May 21, 1997, counsel for Mount Royal requested a clarification of BLM's decision relative to the following two points:

(1) Confirm that the effect of the Decision is to deny approval of the Mount Royal Joint Venture's Plan of Operation MTM 78411 as submitted.

(2) Clarify with respect to Question No. 1 immediately above, the date on which the Decision had been made in order for us to determine the timeframe in which a Notice of Appeal must be filed.

(Letter dated May 21, 1997, from William L. MacBride, Jr., to Thomas P. Lonnie.)

The Deputy State Director replied as follows in a letter to MacBride dated May 27, 1997:

For reasons stated in the May 2, 1997, BLM decision letter, we cannot process the Mount Royal Joint Venture Plan of Operation MTM 78411 in its present form at this time.

To further clarify, the decision affords Mr. Lehmann the opportunity to discuss reasonable options to deal with the original exploration proposal through dialogue initiated by your client, with the Lewistown District Manager within 30 days of the May decision.

The effect of the May decision letter denies processing and approval of the Plan of Operations in the absence of a response to the District Manager by June 14, 1997 (Mr. Lehmann received the decision by certified mail on May 14, 1997). The decision is effective on June 14, 1997, and may be appealed as described in the May letter, within 30 days of the effective date of the decision.

If matters cannot be resolved after discussions with the District Manager and the 3809 action is again forestalled, your client will have another opportunity to exercise his appeal rights.

To preserve its rights, Mount Royal filed its notice of appeal with BLM on June 3, 1997, having first notified BLM on June 2, 1997, that it would also proceed with fashioning a modification of the proposed Plan or discussing other reasonable options for operations. Specifically, Mount Royal advised that "Mr. Grover (BLM geologist in the BLM State Office) and [counsel for appellant] have discussed possible options which consider the status of [the Plan] for all of the 14 unpatented lode mining claims now held by [appellant] \* \* \*," and further advised that the discussions were then ongoing. (May 30, 1997, letter from MacBride to David L. Mari, Lewiston District Manager, at 1.)

On appeal, Mount Royal advances a number of arguments designed to show that BLM improperly delayed the approval process and improperly denied approval of the original Plan. (SOR at 6.) Three arguments pertain to the completeness of the environmental analysis (SOR at 7-9), the completeness of the archaeological and cultural assessments (SOR at 9-12), and BLM's alleged failure to act because of the controversial nature of appellant's mining project, respectively 5/(SOR at 15-17). In addition, Mount Royal challenges the propriety of relying on the pendency of the contest action as a ground for refusing to consider the Plan as submitted (SOR at 12-13), arguing that BLM has no legitimate basis for denying approval of the Plan as submitted (SOR at 14-15). Mount Royal similarly argues that BLM's failure to act is unlawful (SOR at 15-17); that it is attempting to deprive Mount Royal of its due process rights (SOR at 17-18); and that in requiring Mount Royal to notify the District Manager of its election within 30 days of receipt of the District Manager's decision, BLM has imposed a requirement not authorized by the regulations (SOR at 18-19).

[1] Before turning to the merits of Mount Royal's contentions, the form of the decisions here challenged deserves discussion. In our view, State Director Review of the District Manager's response to Mount Royal's December 27, 1996, demand for action was premature and could have been denied on that basis. The District Manager's response on its face was not an appealable decision, since it merely recited the occurrence of various events affecting consideration of the Plan and offered possible courses of action aimed at developing an acceptable plan of operations. We recognize that it could be argued that, in insisting upon a course of action other than approval of the Plan in the form it was submitted, the District Manager's decision constituted a rejection thereof. We do not find such an argument persuasive, however, because the options enumerated also included completing the processing of the Plan as submitted, even though BLM acknowledged the certainty that parts of it would ultimately be rejected if it

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5/ The record confirms that many citizens, including Indian Tribes of Montana and Canada, are against the project.

included the contested mining claims. We think it plain that a next step, which would have constituted an appealable decision, was envisioned by the District Manager. Indeed, the letter closed with the invitation to advise BLM as to how to proceed in considering a Plan: "It is important that you select one of the options discussed or develop an additional option of your own." (February 6, 1997, letter from the District Manager to MacBride.)

Rather than denying review of the District Manager's letter as premature, however, the Acting State Director issued a decision affirming that the Plan could not be processed in its present form and directing Mount Royal to notify the Lewiston District Office within 30 days of its intent to modify the Plan or discuss other reasonable options, failing which BLM would do nothing further to process the Plan and it would be "deemed denied," with the right of appeal to this Board. (Decision at 2.) Thus, the Plan in its original form was denied, although the effective date of that denial ostensibly would not occur for 30 days.

A "decision" subject to appeal is a decision which accomplishes, authorizes or prohibits some action. Defenders of Wildlife, 144 IBLA 250, 255 (1998); Joe Trow, 119 IBLA 388, 392 (1991); Kenneth W. Bosley, 102 IBLA 235, 238 (1988); State of Idaho, 101 IBLA 340, 95 I.D. 49 (1988) (Petition for reconsideration denied January 20, 1988); Beard Oil Co., 97 IBLA 66, 68 (1987). In this case, Mount Royal was prohibited from undertaking any exploration or development activity pursuant to the Plan originally submitted, and regardless of whether Mount Royal timely acted to modify its Plan or suggest a different course of action, the Plan as submitted by appellant was held rejected by the Acting State Director. The Acting State Director's decision therefore was properly appealable to this Board when issued. 43 C.F.R. § 4.410(a).

[2] Turning to the merits, we begin by rejecting the arguments challenging BLM's allegedly deliberate inaction. The District Manager's February 6, 1997, letter informed appellant that all the tasks necessary to continue processing the Plan had been completed, that the suspension of processing imposed on August 9, 1993, was lifted, and it offered possible courses of action, including the invitation to suggest a different alternative. Thus, BLM's alleged inaction ended with the issuance of the February 6, 1997, letter, and Mount Royal's complaints regarding the lack of action before that point in time thereupon became moot. In being given a choice as to how to proceed to a decision, Mount Royal has received all the relief this Board could have ordered, had we had a timely opportunity to consider the issue of BLM's lack of action. Appellant nonetheless argues a point that deserves brief comment.

[3] Appellant challenges BLM's authority to suspend consideration of the Plan while the mineral examination was pending, a period when none of the claims was contested. (SOR at 13.) Approval or disapproval of a mining plan of operations is not wholly a discretionary action, and as a general matter, the mere pendency of a mining claim validity examination, without more, is not a proper basis for suspending consideration of a mining plan of operations. However, when the mineral examination has been

completed and a mineral contest has been initiated, a suspension of consideration of a mining plan of operations is justified. Pass Minerals, 151 IBLA 78, 87 (1999); Southwest Resource Council, 96 IBLA 105, 124, 94 I.D. 56, 67 (1987). As stated, BLM filed a contest complaint challenging the validity of the six disputed claims on March 4, 1996, thereby providing an appropriate basis for suspending action on the Plan, to the extent Mount Royal insisted that its Plan must include the contested claims.

[4] With respect to the eight claims BLM determined to be valid, BLM clearly has the authority to establish reasonable conditions under which mining activities are to be conducted. It has no authority, however, to preclude activities altogether by rejecting a plan of mining operations, "absent a showing that unnecessary or undue degradation will occur." Southwest Resource Council, 96 IBLA at 119-120. "[U]nnecessary and undue degradation," is defined by reference to the manner in which operations are to be conducted. Thus, whether proposed mining activity constitutes "unnecessary or undue degradation" is a question of whether the surface disturbance proposed is greater than that which would normally be expected when the activity is accomplished by a prudent operator conducting "usual, customary, and proficient operations of similar character," with due regard for the effects of operations on other resources and land uses, including those outside the area of operations. 43 C.F.R. § 3809.0-5(k); Southwest Resources Council, 96 IBLA at 123; see also The Committee for Idaho's High Desert, 146 IBLA 194, 202 (1998); Kendall's Concerned Area Residents, 129 IBLA 130, 140-41 (1994). Failure to initiate and complete reasonable mitigation measures or reclamation, for example, or failure to comply with applicable environmental provisions, or to attain a statutory level of environmental protection or reclamation constitutes unnecessary or undue degradation. 43 C.F.R. § 3809.0-5(k).

Under these circumstances, we find no error in either the way BLM chose to proceed or in the way the options were framed, since they are virtually the only choices available: Mount Royal can elect to proceed with the Plan in the form submitted, and BLM can reject it to the extent the contested claims are included; if it wishes to proceed with any mining activity at this time, Mount Royal can submit a modified Plan that eliminates the contested claims, and BLM cannot reject the modified Plan unless it finds that the proposed activity will cause unnecessary and undue degradation; Mount Royal can choose to await the outcome of any relinquishment of mining claims held by Lehmann and modify its Plan as appropriate; or it can elect to suspend all action on a Plan until the mining contest is resolved. In addition, Mount Royal can propose, and BLM can accept, an option that was not articulated by the District Manager which is consistent with the views expressed herein and applicable regulations.



Therefore, pursuant to the authority delegated to the Board of Land Appeals, by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

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T. Britt Price  
Administrative Judge

I concur:

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James L. Burski  
Administrative Judge

